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No. 344

In the

# Supreme Court of the United States

OCTOBER TERM, 1967.

CHARLES ORAN MENSIK and
MARY MENSIK,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Charles Oran Mensik and Mary Mensik, pray that a writ of certiorari be issued, to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

## JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment and opinion of the Tax Court of the United States appear in the certified record. The opinion of the United States Court of Appeals for the Seventh Circuit issued March 28, 1967. The order denying the

petition for rehearing followed on April 11, 1967. The opinion is not yet reported. The opinion of the Court of Appeals and the order above mentioned appear in the Appendix infra.

## JURISDICTION

This petition is timely filed in the Supreme Court of the United States, as it is filed within ninety (90) days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

The sole "additional income" issue here before the Court—stipulated and found to constitute item (b)(6) of the July 11, 1958 deficiency notice—is the pleadings-joined question as to whether a 1956 third-party business loan from Corporation B to C, an individual, in the amount of $176,312.50—whereunder the Commissioner did not contest the fact that C received the full loan proceeds—was or was not bona fide as between the lending and borrowing principals.

The "fraud" issue here before the Court—raised by the Commissioner is his Amended Answer the day trial commenced and never included in any amount in the July 11, 1958 deficiency notice—was a 1955-1956 third-party remodeling job transaction whereunder Corporation A paid $367,800.00 to Corporation B, with the Commissioner asserting that the never-assessed and unliquidated amount of $206,330.56, so paid, constituted a gross "overpayment".

The solely pertinent "question for decision" set out in the Tax Court's opinion of January 16, 1962 was:

"Whether Petitioner realized income as the result of payments by City Savings Association to Melvin Building Corporation in respect of the remodeling of the office building of City Savings, and if so, the amount thereof."

The questions presented are as follows:

Did the United States Court of Appeals for the Seventh Circuit—affirming the Tax Court—err in refusing to treat as reversible error:

1. The Tax Court's departure from both the pleadings and established deficiency notice and civil fraud federal income tax procedure in "determining" only the 1955-1956 "fraud" issue without first determining—as a direct pleadings joined "question for decision"—the deficiency noticed "additional income" issue of bona fides with respect to the $176,312.50 third-party 1956 business loan?

2. The Tax Court's "transactional-switch" whereunder deficiency notice "item (b)(6)"—precisely identified as relating solely to the $176,312.50 third party business loan transaction—was "applied" by the trial court on the basis of a continuing "presumption of correctness" to arrive at "additional income" tax consequences attributed to the $367,800.00 remodeling job transaction which was, itself, devoid of deficiency notice support for such purpose.

3. The Tax Court's failure to decide as a direct question joined in the pleadings the solely pertinent "additional income" issue of bona fides pertaining to "item (b)(6)" of the Commissioner's deficiency notice.

4. The Tax Court's refusal to accord the fully warranted meaning and effect to the legal principle of "bona fides" as shown by its express adoption of the Com-

missioner's erroneous contention that—with respect to whether "item (b)(6)" had been included in error in the deficiency notice—it made no difference whether or not the 1956 third party $176,312.50 business loan was or was not bona fide as between the principals.

5. The Tax Court's March 21, 1966 Order denying taxpayers' timely Rule 19(e) motion for special leave to file motion for retrial, further trial, or reconsideration on the patently erroneous grounds that such motion had been made at a time when the Tax Court had been deprived of jurisdiction as a result of its February 21, 1963 "decision" having become final within the meaning of clearly non-applicable Section 7481 (3)(B)(ii) of the Internal Revenue Code of 1954.

6. The Tax Court's opinion of January 16, 1962, its revised decision of February 21, 1963, and its Order of March 21, 1966 as based on errors of both law and fact constituting unwarranted and unlawful abuses of discretion, and resulting in such unconstitutional and unlawful wrongful taking of petitioners' property without due process of law as to warrant the exercise by this Court of its supervisory powers over the administration, trial procedures, and court adjudications of the federal income tax laws of the United States.

## STATUTES INVOLVED

The statutory provisions involved herein are Sections 7481 (2)(B) and 7481 (3)(B)(ii) of the Internal Revenue Code of 1954.

## STATEMENT OF THE CASE

The Tax Court entered its decision in this cause on February 21, 1963. At the conclusion of the trial there remained never expressly conceded, a specifically assessed

deficiency notice item of $176,312.50 which, as found and stipulated, related specifically to a 1956 $176,312.50 third party Melvin Building Corporation—Orville E. Hodge business loan, asserted by taxpayers in their Petition to have constituted a bona fide loan and with issue as to bona fides having been expressly joined by Commissioner in his Answer.

Without more, this $176,312.50 transactional issue would have presented the Tax Court with a direct "question for decision" on the directly joined issue of bona fides and, in fact, the loan was conceded, at the trial, to have been bona fide. Such concession came about subsequent to the introduction of the loan instruments (Melvin cancelled checks totalling $176,312.50 and Hodge personal judgment notes in identically covering amounts) evidencing a bona fide transaction—by reason of the Commissioner's not contesting the fact that Hodge received the full loan proceeds, introducing no evidence whatsoever controverting the loan's bona fides as between the two third party principals, and, upon brief, abandoning the pleadings-joined issue of the loan's bona fides by not presenting the issue to the Tax Court as a "question for decision".

Since bona fides was the only issue and bona fides was, in fact, conceded, the effect was that the Commissioner had erroneously included the $176,312.50 in the deficiency notice, thus rendering such deficiency notice item no longer valid for purposes of its longer being entitled to any "presumption of correctness". At the trial, the Commissioner, however, at no time *expressly* "conceded" the specifically assessed $176,312.50 deficiency notice item, despite his concession of the bona fides of the $176,312.50 Melvin-Hodge business loan, viz., the precise transaction to which the deficiency notice item related. Because of pre-trial representations made by government counsel that

he was not contesting the fact that Hodge received the full loan proceeds, Hodge was not called by taxpayers as a witness. Under federal income tax law, there is no question that a bona fide business loan between third party principals cannot constitute "income" and, in the circumstances here, could not properly be taxed to Petitioners.

The facts of the case, however, are not so uncomplicated as the foregoing would make them appear. The trial became confused and complicated on the first day—when the Commissioner introduced a never-assessed 1955-1956 $367,800.00 third party City Savings Association-Melvin Building Corporation remodeling job transaction and asserted—as the "fraud issue" in the case—a never-assessed and unliquidated $206,330.56 "claim" allegedly representing an "overpayment" made by City Savings to Melvin in connection with remodeling work on its office building.

The confusion of the trial commenced at the outset and developed principally because of the misleading trial tactics employed by government counsel in focusing attention of taxpayers' counsel and the trial court on the never-assessed $367,800.00 "fraud" issue and away from the directly-joined income realization issue of bona fides with respect to the specifically assessed $176,312.50 third party Melvin-Hodge loan transaction. In making this transactional-switch government counsel—whether by inadvertence or by intent and relying altogether on inferences rather than facts—contended that the specifically assessed $176,312.50 deficiency notice item had been asserted against taxpayers—somehow—by relationship to and in connection with the "afterthought" never-assessed $206,330.56 "overpayment" alleged to have been paid by City Savings to Mel-

vin on the remodeling job. Just as it was necessary in the establishment of the unliquidated "claim" of "overpayment" to proceed by inference, it became necessary in the "establishment" of such a transactional-switch to disregard the facts. The alleged connecting link between the two entirely separate and unrelated transactions was the contrary-to-fact contention that Melvin's funding source for making the uncontested and conceded bona fide $176,312.50 business loan to Hodge was the never-assessed and unliquidated $206,330.56 "overpayment" alleged to have been "fraudulently" diverted to Melvin on the remodeling job.

Following Judge Turner's denial of motion for rehearing, the Tax Court's decision in—which related only to the "fraud" issue—was affirmed, without modification, by the United States Court of Appeals for the Seventh Circuit and, on October 12, 1964, taxpayers' petition for certiorari was denied by the United States Supreme Court.

On October 26, 1964, taxpayers timely filed in the Tax Court of the United States their Rule 19(e) motion for special leave to file motion for retrial, further trial or reconsideration. As an aid to the Court in considering the merits of their October 26, 1964 Rule 19(e) motion, taxpayers, on August 6, 1965, filed with the Tax Court certain memoranda, affidavits, and related documents indicating the nature of the newly discovered evidence and additional new evidence that was not available to the Tax Court at the trial of the cause. Included therein was a jurisdictional memorandum expressly requested by the trial judge.

On March 21, 1966, the Tax Court entered its order denying taxpayers' October 26, 1964 Rule 19(e) motion.

On its face, the Tax Court's Order of March 21, 1966 depends throughout upon the adoption of a series of ministerial actions taken by the Clerk of the Tax Court in what apparently was the effort of the Clerk to close out the case in his office. As to the Clerk's actions in this regard—all of which are adopted by the Tax Court's Order—the basic confusion stems from the erroneous application of Section 7481 (3)(B)(ii) "finality" procedure to a case conforming specifically to the requirements of Section 7481 (2)(B) of the Internal Revenue Code of 1954. Additional ministerial errors on the Clerk's part are also adopted by the Tax Court and, as a result, it becomes apparent that Judge Turner did not receive delivery from the Clerk's office of the documentary material taxpayers filed in support of their October 26, 1964 Rule 19(e) motion—including the jurisdictional memorandum the judge had expressly requested taxpayers' counsel to file—and which they did file. Such documentary material also included, *inter alia, as part of* the newly discovered evidence, neither available nor before the Tax Court at the trial, a detailed financial analysis of Melvin's operational loan policy in effect during the taxable year, including a dollar for dollar bank deposit and withdrawal analysis of the 1956 $176,312.50 Melvin-Hodge business loan transaction and the 1955-1956 $367,800.00 City Savings-Melvin remodeling job transaction. The analysis, prepared by an independent certified public accountant and submitted in affidavit form develops conclusively the fact that not one penny of the entire $367,800.00 received by Melvin from City Savings on the remodeling job was looked to or utilized by Melvin as the funding source for the entirely separate and altogether unconnected $176,312.50 advance to Hodge as a business loan.

On June 17, 1966 taxpayers timely filed their Petition for Review with the United States Court of Appeals for the Seventh Circuit.

On February 28, 1967, the United States Court of Appeals for the Seventh Circuit entered its Order dismissing the Petition for Review and on April 11, 1967 entered its Order denying rehearing of this cause.

## REASONS FOR GRANTING THE WRIT

It is axiomatic that—in furtherance of the interests of justice—the Supreme Court exercises both its judicial and its supervisory powers to correct—when warranted—the judicial and administrative errors and abuses of discretion which—whether through inadvertence or by mistake—result in unconstitutional deprivations of life, liberty or property without due process of law.

This is such a case.

Presented with the opportunity to correct its own errors and abuses of discretion inhering in its opinion of January 16, 1962, and its never-determinative revised "decision" of February 21, 1963, the Tax Court, by its March 21, 1966 order adds additional errors and further abuses to register flatly its unwillingness to give judicial consideration to taxpayers' lawful right to non-taxable treatment. Presented with the same opportunity to correct these Tax Court errors and abuses, the United States Court of Appeals for the Seventh Circuit has declined to exercise its corrective reviewing powers. It remains for the Supreme Court of the United States to unwork what can otherwise—under federal income tax law—only be viewed as a grievous miscarriage of justice.

With respect to the single 1956 "additional income" issue here presented, it would be difficult—in terms of proliferated confusion of fact and law (statutory and general)—to locate a more classically erroneous example of harshly damaging administrative and trial court treatment than taxpayers have received over a nine year period at the hands of the Commissioner of Internal Revenue and the Tax Court of the United States.

Even as this Petition is being filed, the Commissioner is still threatening—with respect to the single June 17,

1958 jeopardy assessment item here before the Court (*viz.*, "item (b)(6)" of Commissioner's July 11, 1958 deficiency notice)—to proceed with the forceful collection of what has now added up to more than $400,000.00 (as "additional" 1956 income, civil fraud penalties, and interest) on a 1956 third party $176,312.50 business loan which was not only non-taxable as to these petitioners but —as an acknowledged business loan uncontested as to *bona fides* as between the third party principals—was a non-taxable transaction as to the lending and borrowing principals, as well.

Yet, this single 1956 transaction—*non-taxable as to anybody*—stands today, under the February 21, 1963 Tax Court decision, as the sole—*but totally erroneous*—basis for the civil fraud penalty additions to tax asserted by the Commissioner. Assuming proper and lawful federal income tax treatment being accorded this single non-taxable item—the Commissioner's June 17, 1958 jeopardy assessment in the amount of $821,951.33 boils down from its economically ruinous amount emblazoned at that time in Chicago headlines to a mere assertment of "additional" 1956 income in the amount of $56,549.15!

From the supervisory standpoint of the Supreme Court, the Commissioner's and the Tax Court's errors and abuses of discretion in the federal income tax treatment accorded this single $176,312.50 non-taxable loan transaction—as affirmed by the Court of Appeals—cry out for correction in the interests of justice when attention is focused on the overt violations of due process engaged in by the Commissioner in this open-faced and brazen attempt to drive a team of horses right through the Internal Revenue Code of 1954. The cumulative errors of fact, law, and procedure are compounded when the presumption is indulged that both the Commissioner and the Tax Court

are regarded generally as possessing special expertness and competence in the administration and operational effect of the federal income tax laws and the trial of "additional income" and "civil fraud" issues arising thereunder. To the extent that the Commissioner is entrusted with the drastic economic power of triggering a taxpayer's newspaper headlined financial ruin by asserting a jeopardy assessment, it may be presumed that he will act with the caution of discretion. To the extent that the Tax Court is regarded as being more than an administrative tribunal, it may be expected that the Tax Court trial judge will, at all times, exert himself in the exercise of judicial discretion. With respect to the single $176,312.50 additional income issue here before the Court,—as can clearly be demonstrated—this case serves to refute and contravene each and all of these generally accepted propositions.

When due process abridgements of civil rights are involved, this Court has always made it clear that it makes no difference who the defendant is; it is the interests of justice that must be protected and served. Certainly, an equal measure of protection against discretionary abuses and legal error should be afforded the citizen taxpayer who—as in this case—may be well enough known in the financial community to be all but defenseless against the irreparable financial injury that headline publicity spotlights—reputation-wise—when the Commissioner of Internal Revenue—charging civil fraud—asserts a recklessly-computed jeopardy assessment in the eye-catching amount of $821,951.33 which ultimately—in the light of the pertinent evidence subsequently capable of development and the applicable principles of federal income tax law—should have amounted, at best, to an assertion of $56,549.15 as "additional" ordinary 1956 income. So ex-

ercised, the Commissioner's jeopardy assessment power becomes an economic instrument of "financial" character assassination resulting, additionally, in the incurrence of what has here developed into nine years of non-productive legal expense. The financial injury resulting from the widespread Chicago publicity accorded the June 17, 1958 jeopardy assessment can, of course, never be repaired. The recklessness of the Commissioner's contrary-to-fact computation is not a matter of conjecture when it is observed that—apart from the erroneous inclusion of the single $176,312.50 non-taxable transaction here before the Court—the Commissioner has long-since formally conceded that $385,190.77, or 62.323%, of the $618,052.42 "additional income" base for the $821,951.33 jeopardy assessment was included *in error* in the July 11, 1958 deficiency notice.

The cumulative errors of general and federal income tax law and the discretionary abuses on the parts of the Commissioner and the Tax Court—as affirmed below by the Seventh Circuit—become compellingly clear when the judicial attention of this Court is focused—with respect to the single $176,312.50 "additional income" issue here presented—on the Commissioner's deficiency notice, the pleadings, the trial tactics, arguments and briefs of government counsel, and the Tax Court's opinion, decision, and ruling entered on petitioners' motion for rehearing. Singly and collectively, these errors and discretionary abuses spell out a totally unlawful taking of taxpayers' property without due process of law. Indeed, they show such a complete Commissioner and Tax Court disregard for the specifically identified $176,312.50 pleadings-joined "additional income" issue raised by the Commissioner himself as stipulated "item (b)(6)" of the deficiency notice—and such a confused preoccupation with the never-

assessed "fraud" issue (which is entirely separate and independent, transaction-wise, from the $176,312.50 third party business loan transaction and totally devoid of deficiency notice support)—as to warrant the legal conclusion that the Tax Court's all but one hundred page opinion *did not even decide* the basic "additional income" issue at all!

"Item (b)(6)" of the July 11, 1958 deficiency notice—as stipulated by the parties and found by the Tax Court—constituted, transaction-wise, a 1956 third party business loan from Corporation B to C, an individual, in the amount of $176,312.50. This is the sole "additional income" item here before the Court.

The taxpayers, in their Petition, asserted that "item (b)(6)" constituted a nontaxable transaction—as a good faith business loan, *bona fide* as between the third party principals. The Commissioner, in his Answer, joined issue by making general denial that the $176,312.50 business loan was *bona fide*, as claimed by taxpayers. Accordingly, the sole "additional income" issue—joined in the pleadings—was the *bona fides* of the $176,312.50 business loan as between the third party principals. Under federal income tax law, there is no question that a *bona fide* business loan cannot constitute "income".

Under federal income tax pleading, practice, and procedure, since determination of "additional income" must be predicated upon precisely asserted deficiency notice support—with civil fraud penalties, if claimed, being, in turn, dependent upon *a prior determination* as to "additional income" giving rise to federal income tax liability—it is clear beyond doubt that "item (b)(6)" of the deficiency notice could, here, only lawfully be held taxable to petitioners upon a specific Tax Court determination—

as the directly presented "question for decision" (*viz.*, income issue) expressly joined in the pleadings—that the precisely identified third party business loan from Corporation B to Individual C was *not* made in good faith as a bona fide non-taxable third party transaction. *This*, the Tax Court never determined!

What does the records show actually happened?

Prior to the trial, government trial counsel advised taxpayers' then-counsel that there was no need for petitioner's to bring in Individual C, the borrowing principal, as a witness—since, with respect to the third party business loan transaction ("item (b)(6)" of the deficiency notice), the Commissioner was not contesting the fact that Corporation B had advanced the $176,312.50 loan proceeds to Individual C.

On the day the trial commenced, the Commissioner filed his Amended Answer introducing—as the "fraud" issue in the case—an altogether separate and never-assessed 1955-1956 third party remodeling job transaction whereunder Corporation A paid $367,800.00 to Corporation B resulting, allegedly, in what was "claimed" to have been an "overpayment" in the unliquidated amount of $206,330.56. Pertinent, here, is the simple fact that this third party $367,000.00 transaction—and its unliquidated never-assessed "claim" as to "overpayment"—had no standing whatsoever as to "additional income" claimed against petitioners because it had never been and at no time was included in the Commissioner's July 11, 1958 deficiency notice. Standing alone—as the "fraud" issue in the case—the $367,800.00 third party remodeling job transaction could, at most, have no federal income tax significance until the Tax Court had, first, specifically determined—as the pleadings-joined "question for deci-

sion"—the "item (b)(6)" $176,312.50 "additional income" issue predicated directly on the Commissioner's own deficiency notice and turning solely on the contested question of *bona fides*.

Under deficiency notice and civil fraud penalty procedure—as basic propositions of federal income tax law—the "fraud" issue—as a *secondary* determination becoming operative merely as a matter of arithmetic computation with respect to federal income tax liability that has first been computed on the basis of directly determined "additional income" issues arising out of the deficiency notice—has no efficacy or meaning in and of itself. The taxpayer charged with X dollars of "additional income" and civil tax fraud penalties thereon who takes issue and successfully defends the *entire* "additional income" amount as having been asserted *in error* in the deficiency notice has no concern with the derivative charge of civil fraud—since total elimination of the "additional income" leaves no computation base upon which to predicate the 50% civil fraud addition to tax! Stated otherwise, it is the deficiency noticed "additional income" issue's prior determination by the Tax Court that controls the "fraud" issue and, without such a prior determination, any determination as to civil fraud is nugatory.

At the trial, the Commissioner, in this case, committed the fatal error of disregarding his own deficiency notice and arguing the derivative "fraud" issue as the solely pertinent "question" to be decided by the Tax Court. Having represented to taxpayers' trial counsel that the pleadings-joined issue of bona fides would not be contested as to the deficiency noticed $176,312.50 "additional income" third party business loan issue, he injected his Amended Answer "fraud issue" into the case and—erroneously "switching" the never-deficiency-noticed $367,-

800.00 "fraud" transaction for the deficiency noticed $176,312.50 "additional income" transaction—focused the entire trial's attention on the 1955-1956 third party remodeling job while, at the same time, obscuring and obfuscating the 1956 third party business loan transaction. His erroneous contention made to the Tax Court with respect to diverting attention away from the pleadings-joined "additional income" issue was that *it made no difference* whether the third party business loan *was or was not bona fide* as between the lending and borrowing principals.

From the standpoint of this Court—when trial counsel—either for the government or for the taxpayer—employ trial tactics which violate basic federal income tax deficiency notice and civil fraud procedure, the Tax Court should properly exercise its statutory powers—looking to the deficiency notice, the pleadings and the issues—and conform to orderly constitutional procedure in deciding the questions before the trial court. In basic matters of due process both parties are entitled to this measure of "judicial" protection in the orderly presentation of the case. *Instead,* the Tax Court adopted—as its own—each and all of the Commissioner's basic errors of federal income tax law.

Disregarding due process altogether, the Tax Court *did not decide*—as the only pertinent "additional income" question presented—the pleadings-joined deficiency noticed issue of bona fides as between the third party principals with respect to the $176,312.50 business loan. Instead, adopting the Commissioner's totally erroneous "transactional-switch" and ignoring the fact that it had no deficiency notice support whatsoever and hence could not constitute in any legal sense an "additional income" issue, the Tax Court expressly stated—as the solely

pertinent "question for decision"—the "fraud" issue raised by Commissioner in his Amended Answer:

> "Whether Petitioner realized income as the result of payments by City Savings Association to Melvin Building Corporation in respect of the remodeling of the office building of City Savings, and, if so, the amount thereof."

The basically fatal error here was that the Tax Court wrote an almost one hundred page opinion and did not arrive at a decision with respect to the solely pertinent "additional income" issue presented in the deficiency notice and by the parties in the pleadings.

Again working directly against the interests of justice was the Tax Court's erroneous refusal to accord legal recognition to the fact that it had *only* decided the "fraud" issue—which could not support any determination of "additional income". Disregarding this fact, the Tax Court—ignoring entirely the additional fact that "item (b)(6)" had been precisely identified in the findings as constituting the 1956 third party $176,312.50 business loan—compounded its earlier erroneous "transactional-switch" by attempting to treat the never-assessed and unliquidated "fraud" claim as "additional income". The Tax Court error in thus confusing the "fraud" issue with the "additional income" issue was the trial judge's illusory reliance on the deficiency notice item's having—at the conclusion of the trial—a continuing "presumption of correctness" with respect to an unliquidated "fraud" claim to which it had no federal income tax nexus whatsoever!

The Tax Court judge expressly pointed up his own erroneous adoption of these basic errors when, upon denial of Motion for Rehearing, he stated:

"Now, most of the discussion as to whether or not the money reached Hodge by way of a loan or otherwise * * * *came in connection with the fraud issue.*"

* * *

"The Court dealt with the issue on that posture and the Court said very plainly that on the record in this case and on the evidence, *the answer would be the same whether or not Hodge received the money as a bona fide loan or whether he didn't receive it.* * * *" (Emphasis supplied.)

As defined in *Webster's New Twentieth Century Dictionary*: "bona fide" means *"with good faith; without fraud or deception* * * *." (Emphasis supplied.) As one of the fundamental concepts of basic general law—including federal income tax law—no taxpayer entitled to the full protection supplied by judicial adherence to due process of law can find that protection—with respect to his claimed immunity from "additional" income tax liability on the justifiable defense that deficiency notice asserted "additional income" is non-taxable as constituting, in its entirety, the proceeds of a business loan, *bona fide* as between the third party principals—when a trial judge, in justification of his adverse decision can totally disregard the pleadings-joined issue of *bona fides,* mix oil and water, and state, on the one hand, the good faith issue of the loan "came in connection with the fraud issue" and, on the other, "the answer would be the same *whether or not* Hodge received the money as a *bona fide* loan". Since a bona fide loan is one "without fraud or deception" it can have *no connection* "with the fraud issue". Moreover, when "the answer would be the same whether or not Hodge received the money as a bona fide loan", Hodge could only so receive the loan proceeds "with good faith; without fraud or deception * * *" in a "genuine" third party loan transaction free from any taint ascribable to taxpayers—with

the basic federal income tax consequence described by the trial judge himself, when he stated in the Tax Court opinion:

> "• • • all of which is another way of saying that the funds so received by him (*sic*, Hodge) were *in fact and in toto the funds of Melvin.*" (Emphasis added.)

Contrary to the Tax Court's express adoption of the Commissioner's erroneous contention that *it made no difference whether the loan to Hodge was or was not bona fide,* the truth is that—in fact and in law—the bona fides of a third party loan *makes all the difference* between taxability and non-taxability of the $176,312.50 as 1956 "additional income" attributable to taxpayers and moreover, to take the position it makes *no difference* is to concede bona fides as to the specifically assessed $176,312.50 and, under federal income tax law, constitutes a confession of error which includes the Commissioner's conceding, at the same time, the erroneous inclusion of the specifically assessed $176,312.50 as "item (b)(6)" in the July 11, 1958 deficiency notice. As to taxpayers, the Commissioner's conceded error in including the $176,312.50 in the deficiency notice—regardless of whether government counsel did or did not stipulate formally to its elimination from the deficiency notice—destroyed any and all "presumption of correctness" that might otherwise—prior to the concession of the $176,312.50 third party loan's bona fides—have attached with respect thereto. A deficiency item so conceded to be erroneous is totally devoid of any longer continuing "presumption of correctness".

From the standpoint of this Court, it becomes clear that the Tax Court's adoption of the Commissioner's totally erroneous contentions made at the trial resulted in a grievous injustice and wrongful taking of property without due

process of law that has never been corrected by either the Tax Court, itself, or by the Seventh Circuit, on review. The errors and abuses of discretion by the Tax Court are basic to the administration of the federal income tax laws in that: (a) the Tax Court never has rendered decision with respect to the single pleadings-joined "additional income" issue here before the Court; (b) the Tax Court has pointed up its own erroneous adoption of Commissioner-advanced contentions which conclusively show that the Commissioner, in fact, confessed error as to his inclusion of the sole "additional income" issue, here presented, in his July 11, 1958 deficiency notice, thus foreclosing retention of any longer continuing "presumption of correctness"; (c) the Tax Court has entered decision only with respect to the "fraud" issue which—because totally devoid of deficiency notice support—was erroneously accorded unwarranted and unlawful "additional income" tax consequences; and (d) the Tax Court has evidenced—upon Motion for Rehearing and upon Rule 19(e) motion for special leave to file motion for retrial, further trial or reconsideration—its erroneous refusal to exercise judicial discretion to hear new evidence directed to correction of the grievous errors compounded in its unsupportable opinion of January 16, 1962 and its erroneous revised "decision" of February 21, 1963.

When an $821,951.33 jeopardy assessment is recklessly asserted in a multi-issue specific item tax case and the taxpayers are charged, as here, with having realized income on many substantial third party transactions requiring the development of evidence not within their control, the last-minute surprise introduction by the Commissioner of an unliquidated and non-specific "fraud" issue with respect to a third party remodeling job overlapping two taxable years can lead to much trial confusion that

can only be controlled by the trial court's strict adherence to orderly deficiency notice and civil fraud procedure in conformance with development of the specific issues raised in the pleadings. That strict and orderly deficiency notice and civil fraud procedure were violated in this case has already been developed above. That the trial record was confused and difficult of understanding is sufficiently evidenced by the Tax Court's own comments in the opinion which prompted the trial judge to state, *inter alia*: "As to Melvin's actual cost on the remodeling job, the record leaves much to be desired"; and, again, "Frankly, considering the state of the record, we do not know what the truth is. * * *"

On motion for rehearing before the Tax Court, petitioners were seeking to develop additionally available third party evidence which their pre-trial reliance on Commissioner's misleading assurances—*viz.*, that the bona fides of the deficiency-noticed $176,312.50 business loan would not be contested—had led them to believe would not be necessary to be presented at the trial. The anomaly here was that the Tax Court—expressly adopting the Commissioner's confession of error with respect to erroneous inclusion of the third party $176,312.50 business loan in the deficiency notice—refused to accord legal effect to the confession's destruction of deficiency notice support for the $176,312.50 "additional income" issue and—erroneously continuing to ascribe non-existent "additional income" tax consequences to the never-deficiency-noticed "fraud" issue —denied petitioners' motion for rehearing. Upon such denial, petitioner's only course of proceeding under due process was to go forward on the lengthy and confusing multi-issue record. The Seventh Circuit affirmed the Tax Court without modification and denied rehearing. This Court denied petition for certiorari on October 12, 1964. With respect to the single "additional income" issue here

before the Court, petitioners' only recourse under the Tax Court's Rules, with respect to presenting newly discovered evidence directed to such trial court's correction of the basic errors outlined above was to seek retrial, further trial or reconsideration. Accordingly, within the permissible twenty-five day period following October 12, 1964, petitioners, on October 26, 1964, timely filed with the Tax Court their Rule 19(e) motion for special leave to file motion for retrial, further trial or reconsideration.

Subsequent to petitioners' timely filing of their Rule 19(e) motion for special leave, the trial judge requested petitioners' counsel to file with the Tax Court a jurisdictional memorandum—which was done. Thereafter, on March 21, 1966, the Tax Court entered its Order—purportedly grounded on jurisdictional facts—erroneously denying the petitioners' Rule 19(e) motion and, again, constituting an abuse by way of refusal to exercise judicial discretion and accord consideration to petitioners' proffer of newly discovered evidence directed to showing that petitioners neither received nor realized any 1956 "additional income" arising, transaction-wise, out of "item (b)(6)" of the July 11, 1958 deficiency notice and, further, that Corporation B, as third party lending principal, did not utilize so much as one penny of the $367,800.00 received from Corporation A on the 1955-1956 remodeling job as a funding source for its $176,312.50 bona fide 1956 business loan to C., the individual third party borrowing principal. (See affidavits of Orville E. Hodge, Carl M. Melberg, Theodore C. Weinberg, and Chris Stolfa, Record Appendix).

The March 21, 1966 Tax Court Order was totally erroneous on its face in that it adopted and incorporated ministerial errors of the Tax Court Clerk and denied even the "filing" of petitioners' Rule 19(e) motion. Further, such Order warrants belief that the Clerk could not even have presented petitioners' earlier filed jurisdictional mem-

orandum to the trial judge—albeit so filed at his express request. This becomes clear when it is observed that the memorandum—predicated upon the precise jurisdictional facts here obtaining—set out the Supreme Court's express interpretation of Section 7481 (2)(B) of the Internal Revenue Code of 1954 according full jurisdiction to the Tax Court to entertain and rule upon the merits of petitioners' Rule 19(e) motion, whereas the erroneous Tax Court Order does not conform to the jurisdictional facts here obtaining and could only have issued in error by reason of misapplication of Section 7481 (3)(B)(ii) of the Internal Revenue Code of 1954 which has applicability only in circumstances where the Court of Appeals has either modified or reversed the Tax Court's trial decision. See *R. Simpson & Co.* v. *Commissioner,* 321 US 225, 64 S. Ct. 496, 88 L Ed 688; *Helvering* v. *Northern Coal Co.,* 293 US 191, 55 S. Ct.; *Lasky* v. *Commissioner of Internal Revenue,* 235 F 2d 97 (CA 9th) (1956), affirmed 352 US 1027, 77 S. Ct. 594, 1 L Ed 2d 598.

Following taxpayers' filing of their timely Petition for Review of the Tax Court's Order of March 21, 1966, the Court of Appeals for the Seventh Circuit heard argument and, affirming the Tax Court's Order, dismissed such Petition on February 28, 1967. On April 11, 1967, the same Court issued its Order denying rehearing of this cause.

## CONCLUSION

In view of the foregoing, taxpayers submit that the Tax Court "decision" of February 21, 1963 and the Tax Court Order of March 21, 1966 are both so erroneous and arbitrary as to warrant discretion in the exercise of this Court's supervisory powers, that the Tax Court grant

taxpayers' October 26, 1964 timely Rule 19(e) motion for special leave to file motion for retrial, further trial or reconsideration with full hearing before the Tax Court on such motion for retrial, further trial and reconsideration for purposes of bringing to the Tax Court's attention the compellingly probative newly discovered evidence which will serve to make it clear beyond doubt that the Tax Court erred in "holding" that the $176,312.50—constituting the full proceeds of the 1956 third party Melvin-Hodge business loan—actually conceded, in fact and in law, to have constituted a bona fide transaction erroneously included in the Commissioner's July 11, 1958 deficiency notice—was "additional" 1956 income taxable to petitioners.

Petitioners submit further that—in the extraordinary circumstances of this cause—the Tax Court's compounded errors as affirmed and adopted by the United States Court of Appeals for the Seventh Circuit—constitute such a grievous abuse of judicial discretion with respect to the merits of this cause as to justify affirmative direction by this Court that the Tax Court not only grant taxpayers' Rule 19(e) motion for special leave but, further, grant full hearing, as well, on taxpayers' proposed motion for retrial, further trial or reconsideration with full right to introduce newly discovered evidence which—in the interests of justice—will unwork what can only properly be viewed as a wrongful and grievous government taking of taxpayers' property without due process of law.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

KINSEY T. JAMES
*Attorney for Petitioners*

# APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 28, 1967

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

CHARLES ORAN MENSIK, and MARY MENSIK,
Petitioners

No. 15799 vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition for Review of The Order of The Tax Court of the United States.

This cause having come on for argument in open court upon briefs of the respective parties and the record on appeal, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the petition for review should be dismissed.

Wherefore, the petition for review filed herein is dismissed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, April 11, 1967

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

CHARLES ORAN MENSIK, and MARY MENSIK,
Petitioners

No. 15799 vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition for Review of The Order of The Tax Court of the United States.

IT IS ORDERED by the Court that the petition for rehearing of this cause be, and the same is hereby DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 344

CHARLES ORAN MENSIK AND MARY MENSIK, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The present petition for certiorari is the culmination of petitioner's [1] attempts to secure review of a decision that the Tax Court rendered against him in 1963, the court of appeals affirmed in 1964, and this Court then declined to review. The sole question

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[1] For convenience, Charles Oran Mensik will be referred to as the petitioner. His wife, Mary Mensik, is a party only because a joint income tax return was filed for the year 1956.

properly before this Court at this time is whether the Tax Court correctly declined to have filed a motion for new trial based on allegedly newly discovered evidence that was sent to it two weeks after this Court's denial of certiorari.

That motion and the supporting documents were filed long after expiration of the period that the Tax Court's rules establish for seeking retrial. There was not compliance with the Tax Court's requirement that special leave be secured to file out of time.

The decision below was, therefore, correct. There is no conflict or other basis for review in this Court.

On February 10, 1964, the court of appeals affirmed the decision of the Tax Court entered February 21, 1963, 37 T.C. 703, which had determined that petitioner was liable for income tax deficiencies and fraud penalties for the year 1956. *Mensik* v. *Commissioner*, 328 F. 2d 147. On October 12, 1964, this Court denied certiorari, 379 U.S. 827. On October 16, 1964, petitioner filed a motion with the court of appeals to stay the mandate pending the filing of a petition for rehearing in this Court. In denying the motion, the court of appeals stated it was "without prejudice to petitioners to request a stay of mandate from the Supreme Court of the United States." Petitioner filed no petition for rehearing in this Court, nor did he request this Court to stay the mandate.

Then, on October 26, 1964, petitioner's counsel sent to the Tax Court two documents, one entitled "Motion for Retrial, Further Trial and/or Reconsidera-

tion" (R. 14-15, 101-104),[2] and the other entitled "Request for Place of Hearing". The Tax Court did not file those documents, but stamped them "lodged" and left them in the custody of the Clerk of the Tax Court (R. 15).

Petitioner took no further action until August 6, 1965, when his counsel delivered to the Tax Court two memoranda, each entitled "Memorandum in Support of Motion for Retrial, Further Trial and/or Reconsideration". One (R. 16-24) had numerous documents attached (R. 24-99). On August 10, 1965, the Clerk of the Tax Court acknowledged receipt of these memoranda, pointing out (R. 8) that the motion for retrial had not been filed but merely "lodged" since it had been delivered following this Court's denial of certiorari, and prior to the receipt on November 2, 1964, of the mandate of the court of appeals; and that since there was nothing pending before the Tax Court, the memoranda had been placed with the motion in the file of the case.

On March 2, 1966, the Tax Court received from taxpayer's counsel a "Request for Date of Hearing on Petitioners' Motion for Retrial, Further Trial and/or Reconsideration," which was neither lodged nor filed, but placed in the custody of the Clerk of the Tax Court (R. 15). On March 21, 1966, the Tax Court entered an order (R. 14-16), stating that the taxpayer's "Motion for Retrial, Further Trial and/or Reconsideration" had not been received until approxi-

[2] "R." references are to the Appendix to petitioner's brief in the court of appeals.

mately two years and nine months after the Tax Court's opinion had been served, and that there had been no request for special leave to file the motion out of time, as Rule 19(e) of the Tax Court's Rules of Practice requires. The Tax Court therefore concluded that no motion was before it, and directed the Clerk to return to petitioner's counsel all the documents, with attachments, that had been received on October 26, 1964, August 6, 1965, and on March 2, 1966.

On March 22, 1966, the Clerk of the Tax Court forwarded all these documents to petitioner's counsel. At the request of that counsel, the Clerk of the Tax Court, on July 22, 1966, sent the unopened package containing the documents to the court of appeals, explaining that they were not certified since they were not part of the record in the Tax Court (Appendix B to the Commissioner's brief in the Court of Appeals). On February 28, 1967, the Court of Appeals dismissed petitioner's petition for review (Pet. 1a).

Petitioner made no reasonable attempt to comply with the fair and orderly procedures the Tax Court provides litigants who seek new trials on the basis of newly discovered evidence. As the Tax Court pointed out (R. 14, 15-16), Rule 19 of its Rules of Practice forbade the filing of a motion for new trial on October 26, 1964, some 2 years and 9 months after its opinion had been served. Rule 19(a) provides that motions must be timely, and Rule 19(e) provides that no motion for retrial, further trial or reconsid-

eration may be filed more than 30 days after the opinion of the Tax Court has been served, except by special leave. The record shows that no special leave to file the motion for retrial was ever granted; petitioner's only mention of a request for leave was a parenthetical comment in the body of the motion itself. For these reasons the Tax Court justifiably refused to consider petitioner's motion.

This Court's Rule 58 does not, as petitioner seems to assume (Pet. 23), deal with the time allowed to seek new trials in the Tax Court—or in any other court of original jurisdiction. Nor does Section 7481 (2) (B) of the Internal Revenue Code of 1954, which states that a Tax Court decision that has been affirmed by a court of appeals becomes final when certiorari is denied, have anything to do with the time for filing a motion for a new trial in the Tax Court. The cases cited (Pet. 24) do not advance petitioner's position. *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225, rehearing denied, 321 U.S. 804, and *Helvering* v. *Northern Coal Co.*, 293 U.S. 191, ruled that predecessors of Section 7481 placed jurisdictional bounds on the power of this Court to grant rehearing of a denial of certiorari in a case originating in the Tax Court. *Lasky* v. *Commissioner*, 235 F. 2d 97 (C.A. 9), affirmed *per curiam*, 352 U.S. 1027, holds that the Tax Court had no jurisdiction to vacate a decision and grant a rehearing after its decision became final under a predecessor of Section 7481.[3]

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[3] The present petition for a writ of certiorari is directed—as were the affidavits and memoranda offered in support of

The petition for certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.*

MITCHELL ROGOVIN,
*Assistant Attorney General.*

DAVID O. WALTER,
CAROLYN R. JUST,
*Attorneys.*

OCTOBER 1967.

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petitioner's new trial motion (R. 24-99)—to one of the numerous factual issues that the Tax Court decided against petitioner in 1963. That issue was whether the Commissioner properly determined a $176,312.50 deficiency for 1956, based on the payment of that sum to the Melvin Building Corporation by the City Savings Association, of which petitioner was managing officer, president and chairman of the board. The documents that accompanied the motion contain no pertinent evidence that was not available to the taxpayer at the time of the trial. The Tax Court in the former proceeding carefully considered arguments similar to those now advanced before it decided the issue against petitioner. See *Mensik* v. *Commissioner*, 37 T.C. 703, 724-743. The question was fully briefed, argued, and decided against petitioner on the prior appeal, and was discussed extensively in the petition for certiorari and brief in opposition filed in this Court.

The jeopardy assessment of which petitioner complains (Pet. 11, 13, 21) was not properly before the Tax Court at the time of trial, and certainly has no relevance here. The existence of fraud, see 37 T.C. at 752-754, in any event made the case especially appropriate for jeopardy assessment, as the court below found in other proceedings. *Mensik* v. *Long*, 261 F. 2d 45, 47-48 (C.A. 7).

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No. 344

In the
# Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES ORAN MENSIK and MARY MENSIK,
*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR REHEARING

KINSEY T. JAMES
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7521 Spring Lake Drive
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The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

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*No. 344*

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CHARLES ORAN MENSIK and MARY MENSIK,
*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR REHEARING

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Petitioners C. Oran Mensik and Mary Mensik, respectively and individually, petition for rehearing of this Honorable Court's Order of October 23, 1967 denying petition for Writ of Certiorari in this cause and respectfully state:

The extraordinary circumstances and facts of this case present both newly discovered evidence and other substantial grounds not previously presented, together with a compounding of procedural errors by the Commissioner

of Internal Revenue and government counsel together with the Tax Court's compounded errors—in, first, refusing arbitrarily and capriciously to accord judicial consideration to taxpayers' October 26, 1964 timely Rule 19(e) motion for special leave, and, secondly, in resorting arbitrarily to the "erroneous" procedural Order of March 21, 1966, to avoid the lawfully warranted further consideration of the altogether erroneous Tax Court decision of February 21, 1963 which such Court's pre-finality jurisdiction empowers—constitute such a grievous abuse of judicial discretion with respect to the merits of this cause as to justify affirmative direction by this Court that the Tax Court not only grant taxpayer's Rule 19(e) motion for special leave but, further, grant full hearing, as well, on taxpayer's proposed motion for retrial, further trial and/or reconsideration with full right to introduce newly discovered evidence which—in the interests of justice—will unwork what can only properly be viewed as a wrongful and grievous government taking of taxpayer's property without Due Process of Law.

The Petitioners' position is that of any taxpayer seeking the protection of this Court from arbitrary or even innocent mistake in the action of the Commissioner of Internal Revenue in a wrongful assessment and subsequent collection or taking of property in violation of Due Process of Law. These taxpayers simply did not receive the money now found by the Tax Court to be "income". The newly discovered evidence fully documents and supports this position. This evidence was not entirely available at time of trial. It has been offered to the courts below but refused by them on grounds that taxpayers' petition for rehearing was filed with the Tax Court out of time. It is the position of Petitioners that such motion, contrary to Respondent's position, did specifically

request *special leave* pursuant to Rule 19(e) of the Tax Court and was filed timely (see Record Appendix pp. 16-24) in that the Tax Court could entertain such a motion because the litigation of this cause had not yet become *final* at the time such motion and petition was made.

This case originated by way of jeopardy assessment in the amount of $821,951.33. Taxpayers were advised of this by way of the Chicago Daily News which ran a screaming front page double headline "CHARGE MENSIK OWES $860,699 IN TAXES". This was in June of 1958 and the newspapers unsuccessfully attempted to find an alliance between City Savings Association, of which C. Oran Mensik, the male Petitioner here, was president, and Orville E. Hodge who was Auditor for the State of Illinois and involved a multi-million dollar scandal in connection with alleged embezzlement of State of Illinois funds. Taxpayers received a deficiency notice wherein the exact amount of "income" claimed as subject to assessment amounted to $618,052.42.

It is to be noted that by stipulation, when the case came on for trial in the Tax Court, the Commissioner admitted that there was error in the deficiency notice. This error was neither small nor simple. In fact it was a series of unexplained hasty and arbitrary errors amounting to $385,190.77 all of which the Commissioner, over a period of some 13 months, had to admit were wrong and so stipulated. There was no such formal stipulation as to the *specific item* of $176,312.50 still in issue here before this Court. The original jeopardy assessment of $821,951.33 was admittedly wrong by several hundreds of thousand dollars and it is the position of these taxpayers that they did not receive any of the $176,312.50 here remaining at issue and further that there is evidence and documents which conclusively show they did not receive this money

nor any economic benefit therefrom. Further the taxpayers now can bring in witnesses and documents to show where this money went, including the principal who borrowed and actually received the money, Orville E. Hodge, who was in prison at the time of the trial of this cause and was not present as a witness. It is vital that this Honorable Court consider here that the Respondent seeks to recover not only an arbitrary tax of some $88,000.00 on the $176,312.50, which these taxpayers *can now* demonstrate they did *not* receive, but also penalties and interest which double in compounding amounts that more than destroy the economic security and financial capability of this taxpayer and his family. Such a crushing assessment, based as it is on an incomplete record, requires reconsideration in the interest of justice and an exercise of this Court's powers of supervision over what Petitioners can now show has not been an orderly and just procedure. The 14th Amendment to the Constitution requires every action of the Commissioner to be in conformance with Due Process of Law.

On the eve of trial government counsel filed an amended Answer in this case in the amount of $206,330.56 allegedly received by Melvin Building Corporation. This presented confusion by reason of the fact that it related to an entirely unconnected and never assessed, unrelated contract by City Savings and Melvin Building Corporation for a remodeling job transaction which extended over a period of two years. It is to be noted that this case involves only taxpayers' calendar year 1956. The direct question joined by the pleadings related to the specific $176,312.50 which the Court expressly found to constitute the amount of the three Melvin checks and the three identical corresponding Hodge personal judgment notes executed in connection with the Melvin-Hodge loan. How-

ever, instead of presenting the direct question of the $176,312.50 loan on the direct issue of "bona fides", the trial court in his findings took a most startling and unusual position and stated:

> "The Court dealt with the issue in that posture and the Court said very plainly that on the record in this case and on the evidence the answer would be the same whether or not Hodge received the money as a bona fide loan or whether he didn't receive it."

Such a patently erroneous misstatement of federal income tax principles can only invite the working of grievous injustice upon any taxpayer thus affected. It is axiomatic that any assessment of income tax on proceeds of a bona fide loan is not valid because such a loan does not give rise to taxable income. It makes all the difference in the world whether . . . "Hodge received the money as a bona fide loan or whether he didn't receive it". These taxpayers seek the right to present newly discovered evidence that will show Hodge did receive such a loan and that they did not receive one penny!

## THE NEW EVIDENCE

The newly discovered evidence—taking the form of affidavits, copies of officials documents, corporate data, bank statements and other records—was submitted to the Tax Court in support of Petitioners' timely filed Rule 19(e) motion for special leave. Petitioners contend that the refusal of the Tax Court to even accept such filing or consider such evidence was an abuse of discretion violative of Due Process of Law. Such motion for special leave was directed to assisting the Tax Court in resolving the extraordinary circumstances which beclouded the "truth" as to determination of Petitioners-Appellants' proper income tax liability consequences with respect to the specifi-

cally assessed $176,312.50 Melvin-Hodge loan constituting "item (b)(6)" of the Commissioner's July 11, 1958 deficiency notice. These affidavits, singly and collectively, show conclusively that: (1) "item (b)(6)" of the deficiency notice related solely to the 1956 Melvin-Hodge $176,312.50 loan which was not directly contested as to "bona fides" as between the principals Orville E. Hodge and Melvin; (2) the Commissioner, subsequent to the Tax Court's February 21, 1963, decision herein, issued to Orville E. Hodge his June 14, 1963, 90 day letter—viz., deficiency notice—assessing the identical $176,312.50 as constituting 1956 "additional income" taxable to Orville E. Hodge, duplicating the precise specific item here in issue and seeking to tax Hodge! (3) Melvin—as can now be conclusively demonstrated by a detailed financial analysis of the corporation's loan policy in effect during the 1956 taxable year, includes a dollar-for-dollar deposit and withdrawal analysis of the $176,312.50 Melvin-Hodge business loan transaction documenting the direct flow of these funds to Hodge, not these taxpayers, and the use of these funds by *Hodge* himself.

It is uncontested that Melvin Building Corporation reported, for tax purposes, the full receipt of the total $367,500.00 for the City Savings remodeling job. The new evidence will trace the Hodge loan from its transactional beginning through its conclusion and clearly show that Hodge received all the proceeds and Mr. and Mrs. Mensik did not receive one penny of the $176,312.50 and further that no so-called "favors" or economic benefits occurred by reason of this transaction.

We have here a deficiency notice in a *specific items* case that specifically includes a specifically assessed transactional item that—by stipulation of the parties is precisely identified as amounting to exactly $176,312.50—a figure

in odd amount—and this specifically assessed deficiency notice item is precisely identified at the trial—and included in the Tax Court's findings—as constituting a 1956 Melvin Building Corporation-Orville E. Hodge loan. The new evidence goes to the heart of this direct question and will demonstrate not only the bona fides of this loan but further it will fill the void in this record and show that these taxpayers were not in receipt of one cent of this money nor did they receive any so-called "favors" or "economic benefit" that could possibly represent such $176,312.50.

## THE RECORD DOES NOT SHOW THAT THESE TAXPAYERS RECEIVED ANY INCOME OR FAVORS FROM THE HODGE-MELVIN LOAN

Due Process, being affirmatively and specifically stated as a just and legal requirement in the 14th Amendment of the Constitution, is an absolute constitutional guarantee to these citizen taxpayers and since the posture of this case has now reached the final stage and last resort, the taxpayers request the granting of this Petition to present the extraordinary circumstances, which if known—at time of trial—the Tax Court would not have rendered the decision it did, and will enable taxpayers to present evidence of conduct by Respondent, before decision but after this case was taken under submission by the Tax Court, then unknown to Petitioners, and actions taken by Respondent after decision of the Tax Court, which action is entirely inconsistent with the Respondent's conduct during trial and contrary to the theory of proof offered by Respondent in its presentation of evidence to the Tax Court in this cause.

Petitioners further state that all courts below have refused to allow the presentation of the newly discovered evidence or to allow testimony that goes to the heart of the trial judge's complaint expressed in the Tax Court

decision in language so astounding as to be a judicial cry for the relevant facts here sought to be entered into this record. The Tax Court in its decision says: • • •

> "Frankly considering the state of the record, we do not know what the truth is . . ."

The trial court can never know the full truth when:

1. The *record* is void of direct testimony or documents showing that these taxpayers received any of the proceeds from the $176,312.50 Hodge-Melvin loan transaction.

2. The *record* is void of direct testimony or documents showing any economic benefits received by these taxpayers from the $176,312.50 Hodge-Melvin loan transactions.

   a. The Commissioner wrongfully asserted as "income", against Petitioners-Taxpayers, the proceeds of the Hodge-Melvin loan transaction.

   b. The Commissioner wrongfully asserted tax liability against these taxpayers by assessing the proceeds of this Hodge-Melvin loan transaction as "income", none of which the taxpayers received either directly, by construction or in the form of any "economic benefit".

   c. The Comissioner wrongfully assessed these taxpayers for so-called "favors" that were not received from Hodge or anyone else as the new evidence will show.

   d. The Commissioner wrongfully asserted penalties of 50% amounting to more than $100,000.00 in connection with this Hodge-Melvin loan which event is not properly a taxable transaction.

Since the lower courts have been steadfast in their refusal to allow Petitioners to bring in any new evidence

or to hear testimony to fill the *void* in this record and arrive at *truth*, it can be only upon grant of rehearing that the true cause of justice can be served. The Sixteenth Amendment is a grant of power for the taxation of income. Under it that may not be taxed which is *not* "income" nor can the government resort to sharp practice in invoking a technical fiction of "economic" gain *not* "realized". It is basic that such an economic benefit must be a *realized gain* either "actual" or "by construction" before it is lawful to assess and tax. It is the absolute and constant position of these taxpayers, which now can be fully supported by newly discovered evidence and by testimony of third party principals, that these taxpayers *did not* receive in any fashion either directly, constructively, or indirectly, through alleged favors, economic gains, or in any other way, the $176,312.50 determined by the Tax Court to be taxable "income". In point of fact there has never been evidence directly contesting the taxpayers' position and the procedural "presumption of correctness" of the Commissioner's assessment will fall in the face of the new evidence which heretofore has not been evidence of record in this case.

In the instant case—with full recognition that it is not a contention to be advanced frivolously or lightly—taxpayers contend most earnestly that the cause of justice can best be served by this Court's determining, that there has been not only an independent abuse of discretion with respect to the Tax Court's entering of its Order of March 21, 1966 but, with respect to both the trial record and the January 16, 1962 Tax Court opinion as well, earlier abuses of discretion which—with respect to the federal income tax consequences ascribed to a 1956, $176,312.50 bona fide Melvin Building Corporation-Orville E. Hodge business loan—amounts to a wrongful and grievous government taking of taxpayers' property without Due Process of Law.

The trial court judge's Order of March 21, 1966 on its face, is abusive of discretion in its being predicated on ministerial errors as to federal income tax law committed by the Clerk of the Tax Court and adopted as the basis for the Tax Court Order. Even more serious, as a judicial act, this Order constitutes both an *abdication* of the Tax Court's duty to exercise judicial discretion and a disposition not even to consider—in the interests of justice—the opportunity for presentment of the full and "true" facts as to a transaction constituting a basic "question for decision" expressly put in issue by the parties but omitted altogether from direct consideration in the January 16, 1962 opinion and—by reason of a record prompting the trial judge's own admission that he did not "know what the truth is"—constituting an issue never "tried" on its specific relevant facts in the *first instance.*

It is urged that this Honorable Court reconsider the proferred new evidence set out in the Appendix Record. Such documentary material also included, *inter alia,* as part of the newly discovered evidence, neither available nor before the Tax Court at the trial, a detailed financial analysis of Melvin's operational loan policy in effect during the taxable year, including a dollar for dollar bank deposit and withdrawal analysis of the 1956 $176,312.50 Melvin-Hodge business loan transaction. The analysis, prepared by an independent certified public accountant and submitted in affidavit form (See Appendix pp. 24-25) develops conclusively the fact that the $176,312.50 was an advance to Hodge from Melvin Building Corporation as a bona fide business loan. That there were no "favors" of a political nature or so-called "economic Benefits" is evidenced by the new evidence in the affidavit of Mr. Chris Stolfa the Chief Examiner of the Auditor's Office of the State of Illinois during all times here pertinent. (See

Appendix p. 95) The new evidence will further show that the entire proceeds of this $176,312.50 loan were received and used by Orville E. Hodge himself and further that not one cent went to these Petitioners as evidenced by affidavit of Mr. Hodge. (See Appendix p. 46). The real pleadings-joined question in connection with this basic issue was not decided nor tried in the first instance.

## CONCLUSION

The extraordinary circumstances of this case, wherein the Tax Court Judge, expressly criticizing the inadequacies of the trial court record, flatly acknowledged in the Tax Court opinion that he did not "know what the truth is"—demonstrates as an actual fact that much evidence was never presented nor available for presentment at the trial because either not yet discovered or known, or not then in existence. Moreover, as taxpayers can demonstrate, certain pertinent evidence which could otherwise have been marshalled and presented at the trial was kept out of the record by reason of the misleading tactics there employed by government counsel. Petitioners further state that they were not negligent in any degree in failing to present such evidence at time of trial and further, that they exercised due diligence in such discovery of new evidence because such evidence includes documents, which as shown upon the face thereof, did not exist until after the Court rendered its decision, and further, Petitioners can now present intervening circumstances, testimony and evidence which, if known to this Court, in the interest of substantial justice would require it to grant relief to the Petitioners.

Further, unless such new evidence as has been discovered since the conclusion of the trial is brought to the Tax Court's attention for judicial analysis on the merits, a grievous wrong will have been worked upon Petitioners-Appellants by reason of both trial and post-trial errors on the part of the Tax Court than can justifiably be viewed by this Court as being both contrary to the interests of justice and amounting, in cumulative effect, to such an abuse of discretion as requires this Honorable Court to exercise its supervisory powers over the courts below, in the protection of the Constitutional rights of these taxpayers in their entitlement to present the new evidence which supplies the full "truth" to the record *now* acknowledged by the lower court to be inadequate. To now tax these Petitioners would in truth and fact be taking property from them in violation of the 14th Amendment to the Constitution, in derogation of Due Process of Law.

For the foregoing reasons these Petitioners respectfully pray that this Honorable Court grant a Rehearing in this matter.

Respectfully submitted,

KINSEY T. JAMES
*Attorneys for Petitioners*

## CERTIFICATE OF COUNSEL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 344

CHARLES ORAN MENSIK and MARY MENSIK,
*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

State of Illinois }
County of Cook } ss.

## AFFIDAVIT

Kinsey T. James being duly sworn upon his oath states that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay and further certifies that the Petition is restricted to the grounds above specified.

## PROOF OF SERVICE

Affiant further states that copies of the Petition have been served upon:

Honorable Ralph S. Spritzer
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
Attorney for Respondent

by First Class Mail
at Chicago, Illinois, charges prepaid, and addressed as above.

And further affiant sayeth not.

/s/ Kinsey T. James

Subscribed and sworn to before me
this 15th day of November, 1967

/s/ G. B. Jarecki
Notary Public